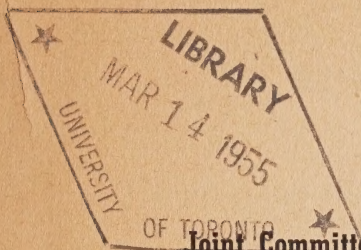


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Canada, Capital and Corporal Punishment
AND LOTTERIES, JOINT COMMITTEE OF THE SENATE
AND HOUSE OF COMMONS ON

SECOND SESSION—TWENTY-SECOND PARLIAMENT
1955



Joint Committee of the Senate and the House of Commons

ON

CAPITAL AND CORPORAL PUNISHMENT AND LOTTERIES

Joint Chairmen:—The Honourable Senator Salter A. Hayden
and

Mr. Don F. Brown, M.P.

MINUTES OF PROCEEDINGS AND EVIDENCE

No. 3

THURSDAY, FEBRUARY 24, 1955

WITNESS:

Mr. John V. Fornataro, Director of Corrections, Department of Social
Welfare and Rehabilitation, Province of Saskatchewan.

EDMOND CLOUTIER, C.M.G., O.A., D.S.P.
QUEEN'S PRINTER AND CONTROLLER OF STATIONERY
OTTAWA, 1955.

COMMITTEE MEMBERSHIP

For the Senate (10)

Hon. Walter M. Aseltine	Hon. Nancy Hodges
Hon. Paul Henri Bouffard	Hon. John A. McDonald
Hon. John W. de B. Farris	Hon. Arthur W. Roebuck
Mon. Muriel McQueen Fergusson	Hon. Clarence Joseph Veniot
Mon. Salter A. Hayden (<i>Joint Chairman</i>)	Hon. Thomas Vien

For the House of Commons (17)

Miss Sybil Bennett	Mr. A. R. Lusby
Mr. Maurice Boisvert	Mr. R. W. Mitchell
Mr. J. E. Brown	Mr. G. W. Montgomery
Mr. Don. F. Brown (<i>Joint Chairman</i>)	Mr. H. J. Murphy
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Hon. Stuart S. Garson	Mr. Philippe Valois
Mr. C. E. Johnston	Mr. H. E. Winch
Mr. Yves Leduc	

A. Small,
Clerk of the Committee.

MINUTES OF PROCEEDINGS

THURSDAY, February 24, 1955.

The Joint Committee of the Senate and the House of Commons on Capital and Corporal Punishment and Lotteries met at 11.00 a.m. Mr. Don. F. Brown, Joint Chairman, presided.

Present:

The Senate: The Honourable Senators Aseltine, Bouffard, Farris, Fergusson, Hodges, and Vien.—6

The House of Commons: Miss Bennett, Messrs. Boisvert, Brown (*Brantford*), Brown (*Essex West*), Cameron (*High Park*), Fairey, Garson, Johnston (*Bow River*), Leduc (*Verdun*), Mitchell (*London*), Montgomery, Shipley (Mrs.), and Winch—(13).

In attendance: Mr. John V. Fornataro, Director of Corrections, Department of Social Welfare and Rehabilitation, Province of Saskatchewan; Mr. D. G. Blair, Counsel to the Committee.

On motion of the Honourable Senator Hodges, seconded by Mr. Montgomery, the Honourable Senator Fergusson was elected to act for the day on behalf of the Joint Chairman representing the Senate due to his unavoidable absence.

On request of the presiding Chairman, Counsel to the Committee introduced Mr. Fornataro.

Mr. Fornataro presented and read the brief of the Province of Saskatchewan on the abolition of capital and corporal punishment, copies of which had been distributed in advance, and which supplements the answers to the questionnaires of capital and corporal punishment submitted by the Province of Saskatchewan to the previous session's corresponding Committee.

The Witness was questioned by the Committee on his submissions.

The presiding Chairman expressed the Committee's appreciation to the witness for his presentations.

The witness retired.

At 1.20 p.m., the Committee adjourned to meet again as scheduled.

A. Small,
Clerk of the Committee.

EVIDENCE

FEBRUARY 24, 1955.

11:00 a.m.

The PRESIDING CHAIRMAN (Mr. Brown, Essex West): A motion will now be in order to appoint an acting Joint Chairman for the Senate for the day.

Hon. Mrs. HODGES: I move that Senator Fergusson take the chair.

Mr. MONTGOMERY: Seconded.

The PRESIDING CHAIRMAN: Carried.

(Hon. Mrs. Fergusson assumed the chair as co-chairman).

The PRESIDING CHAIRMAN: It might be appropriate at this point to tell you that the next meeting will be held on Tuesday next, March 1, when we will hear the Canadian Legion on the subject of lotteries. Mr. Blair, would you introduce the guest witness today?

Mr. BLAIR: Madam Chairman and Mr. Chairman, our witness today is Mr. John V. Fornataro, the Director of Corrections for the Province of Saskatchewan. Mr. Fornataro is a native of Ontario and a graduate in arts and theology of the University of Toronto. He was for several years a United Church minister in a village in Saskatchewan. He then went back to the University of Toronto to take post-graduate work in social work. For the past seven years he has been associated with the Corrections Branch in the Department of Social Welfare and Rehabilitation of the Saskatchewan government, and for half of that time he has served as the Director of Corrections. I have pleasure in introducing Mr. Fornataro.

Mr. JOHNSTON (Bow River): He is speaking on behalf of the government?

Mr. BLAIR: Yes, as I understand it.

Hon. Mr. VIEN: Of the federal government?

Hon. Mr. GARSON: The Saskatchewan government.

Mr. John V. Fornataro, Director of Corrections, Province of Saskatchewan, called:

The WITNESS: Madam Chairman, Mr. Chairman and members of the committee, I believe that you have already been supplied with a copy of the brief setting forth the opinion of the government of Saskatchewan on the matters which are before you. With your permission, I shall read it, to be sure that we have all gone over the material.

Hon. Mr. VIEN: Could I ask a question?

The PRESIDING CHAIRMAN: The practice, Colonel, if you do not mind, has been to submit questions at the close of the presentation. It might be well to do that rather than to have a discussion now.

Hon. Mr. VIEN: I am not discussing it, but I was wondering whether they were in favour of it.

The PRESIDING CHAIRMAN: The briefs were circulated among the committee a few days ago.

Hon. Mrs. HODGES: The brief paragraph sets that out.

The WITNESS: At the outset may I suggest that I am avoiding as far as possible any great reliance on statistical data or evidence, because I feel that it has very limited usefulness. It may give us some indication as to tendencies, but I feel that statistics should be used with great caution since, as you very well know, I am sure, people of differing opinions can use them to put forth a point of view about which they feel personally convinced.

The government of the province of Saskatchewan believes that the Criminal Code of Canada should be so amended as to abolish corporal punishment and capital punishment. We commend the government of Canada for setting up a joint committee of the Senate and the House of Commons to carry out a study of these matters for the guidance of parliament in deciding issues of such grave importance. We are pleased herewith to set forth the main facts and considerations which have led our government to believe that the abolition of corporal and of capital punishment will be in the best interests of Canada.

It is our conviction that before the provisions of the criminal law can be set forth in detail, the purpose of the law should be clearly defined in terms of the philosophy and concepts which are to govern the treatment of the offender. We are of the opinion also that during the years which have followed the original framing of the Criminal Code of Canada, sufficiently significant changes have occurred, both in our social mores and in our understanding of behaviour, that the very purpose of our system of justice should be redefined. The countries of the civilized world, in short, are in substantial agreement that punishment of the offender *per se*, as an indication of society's vengeful feelings, is indefensible and must give place to systems of individualized, justice whose aim is the effective protection of society by means of correcting the offender.

Hon. Mr. GARSON: Might I interrupt here? Is it proper for members of the committee to ask for explanations as we go along to make sure that we understand just what the text means, or is it better to ask these questions afterwards?

The PRESIDING CHAIRMAN: It has been the practice to withhold questions until we have completed the presentation. However, the committee will set its own rules.

Mr. WINCH: May I suggest that we follow our usual practice.

Hon. Mr. ASELTINE: They have checked me on several occasions.

The PRESIDING CHAIRMAN: Well, I would not want to show any favouritism.

The WITNESS: Such a change in emphasis, it is to be stressed, is not conceived in the spirit of sentiment or emotional revulsion against the physical rigors which the offender may undergo as punishment. Contemporary developments in this field have been given impetus rather as the result of society's experience with a punitive system of justice and as the result of growing knowledge concerning the cause of human behaviour, and in particular, deviant behaviour. This growing field of knowledge, largely the result of research in the social sciences, has been put to profitable use in the study and therapeutic treatment of the mentally ill throughout the civilized world. In more recent times, much of this knowledge has been used on a limited scale in the treatment of the offender.

We cannot ignore the verdict of history which repeatedly leads us to the conclusion that crime has seemed to flourish most widely in times and places where punishment was most rigorous. The high rate of recidivism in this country, which has been alluded to by the royal commission established in 1938 to investigate the penal system of Canada, and repeated instances of increasingly degenerate behaviour in offenders leaving prison, have led many thoughtful people to conclude that, "Our prisons are schools of crime."

For a generation now, study and research in the social sciences have succeeded in affording to the human race pertinent knowledge concerning the cause and meaning of human behaviour from which deductions may be possible concerning the correction of a social and anti-social behaviour. While there is still considerable in this field that is not known and is still the subject of experimentation and study, there is sufficient data, whose reliability has been demonstrated and which is pertinent in any consideration concerning the offender, that the criminal law should take cognizance of it.

Criminal behaviour is not the private responsibility of the individual offender alone. We recognize now that all human behaviour has meaning in terms of motivation of the individual in attempting to satisfy needs which are frequently unconscious. This concept is admittedly not so simple as earlier and more naive interpretations of behaviour such as the innate presence of a devil which could be exorcized only through physical mutilation. Having recognized that behaviour is influenced by the interaction of inherent individual characteristics and the experience of the individual in the midst of his environment and prevailing culture, it has become inferred that the possibility of modifying behaviour may exist through a modification of those conditions which are its determinants.

Since the object of systems of justice is the safe-guarding of the community against the breach of its laws, and inasmuch as vindictive punishment does not appear to have provided society effectively with such protection, and in the light of the possibility of so modifying the attitude and behaviour of the individual offender that his depredations will either cease or be diminished, it appears to us that the criminal law should concern itself not with the exercise of social revenge but with the enhancing of society's protection by subjecting the offender to those forms of treatment which, in the light of existing knowledge, are best calculated to reform the offender.

It is our opinion that the abolition of corporal punishment and of capital punishment would remove from Canada's judicial system provisions, which, notwithstanding the intent of the court, carry significance only as vehicles of vengeance which in no way contribute to the reformation of the offender.

Corporal Punishment

It is sometimes argued that flogging has a deterrent value of unusual efficacy. The arguments are usually based upon isolated instances which assumed an almost legendary quality, but upon examination are not defensible as general truths. In Britain, the departmental committee on corporal punishment, established in 1937, made extensive statistical studies covering some seventy-five years. The unanimous opinion of the committee was:

After examining all the available evidence we have been unable to find any body of facts or figures showing that the introduction of a power of flogging has produced a decrease in the number of offences for which it may be imposed, or that offences for which flogging may be ordered have tended to increase when little use was made of the power to order flogging; or to decrease when the power was exercised more frequently.

The judgment of the Gladstone Committee of 1895 in Britain was that the *certainly* of punishment, rather than its severity, constituted its deterrent value. This committee in its evidence showed that severity carried beyond a certain point tended to defeat its own object by turning the casual offender into an embittered person who continued in offences against society.

The British departmental committee, referred to earlier, made a study of 142 offenders who were flogged between 1921 and 1930, and 298 who were liable to flogging because of their offences and their records but were not

flogged. Of those who were flogged 55 per cent were subsequently convicted of further serious crimes. Of the men who were not flogged 43 per cent later committed offences. The committee declared that flogging itself as a judicial disposition seemed to increase the offender's tendency to crimes of violence. In 1948 the British parliament abolished corporal punishment.

Professor Robert G. Caldwell, of Virginia, in 1946 undertook a statistical study of the effectiveness of the lash in the state of Delaware, the only state in the American union retaining the lash. In the one county studied, the years 1928, 1932, 1936, and 1940, were used as samples. During these years and in this county, of all the offenders who were liable to be lashed, 73 were sentenced to be lashed and 516 were sentenced without lashing. It was determined that the difference in sentence was the result of a difference on the part of the court's attitude rather than the character of the offender. Of the 73 who were lashed 69 per cent had been convicted of offences again by 1944. Of the 516 who were not lashed 52 per cent were convicted again by 1944. Further significant statistical breakdown of the 516 who were not lashed was made indicating that out of this number, of those committed to prison 61 per cent were later convicted, and of those placed on probation only 37 per cent were again convicted. Professor Caldwell concluded that the lash

tends to breed in the minds of all an insensibility to human suffering which itself produces crime.

It is not our intention to prepare exhaustive statistical tables in demonstration of our belief that corporal punishment does not add to the protective value of the court's sentence. Your committee will undoubtedly bring to light a large quantity of statistical data on which to base its conclusions. We are impressed, however, by the fact that what statistics appear to be available lead to one conclusion. This is typified by the observation that although crimes of violence increased in the United Kingdom since 1948, when sentences including flogging were abolished, those crimes previously punishable by flogging decreased.

We are further inclined, in our present position, by the observation that the imposition of corporal punishment by the court is a vestige of primitive vengeance promoted by emotionalism which tends to brutalize both the punished offender and the society in whose name the penalty is imposed. Flogging, as a judicial punishment, is virtually extinct in the civilized world. To the best of our knowledge, among the civilized countries of the world only Egypt and South Africa, together with the state of Delaware, retain this provision together with Canada. Something of its sadistic aspect is evident in the Canadian practice of ordering a certain number of lashes to be administered as soon as possible after imprisonment while retaining the balance of the lashes to be administered shortly before the discharge of the offender from prison. It is not difficult to see with what futility prison administrators would attempt to carry on a rehabilitative program with an offender who must be lashed toward the end of such a program. If corporal punishment clearly reformed, its advocates would have a defensible position but we are aware of no evidence to support this contention. The real case against corporal punishment is not the pain which is implicit in such a penalty but its ineffectiveness. The overwhelming weight of evidence seems to indicate that the offender, who has been subject to the last by the order of the court in the name of society, becomes worse. It is, as it were, a case of a person who for one or a multitude of reasons has set himself to prey upon society. Society then says, "Since you are acting like an animal we will treat you like an animal and flog you." Such treatment has the effect, understandably, of confirming the offender in his

original attitude that his interests and society's interests are anti-thetical and that his survival depends upon his ability to outwit the law-abiding section of society.

What we may not have recognized so fully in the past also is the demoralizing effect of such a punishment upon those who inflict it. We are aware, for example, of the dangers inherent in such punishment. Dr. Edward George Glover, a British scientist, in a booklet entitled "The Psychopathology of Flogging" states,

A degree of pain is inflicted which may exceed the limits of individual endurance and produce immediate shock. The amount of shock varies, but *can be compared to a surgical operation without an anaesthetic.*

The very fact that a physician is required first to examine the offender physically before lashes are imposed and must be present during the flogging to check the offender's pulse periodically is evidence of a recognized danger. It can scarcely be maintained that those who deliberately inflict torture which is so patently fraught with disaster can retain the sense of normal human values which is the safeguard of every civilization.

The thinking of the Ontario Court of Appeal in the case of *Rex vs. Childs*, 71 C.C.C. page 70, gave expression to this sentiment in the words of the judgment delivered by the Honourable Justice Middleton. He commented in part,

While we are content to remain among the backward nations of the earth and have upon our Criminal Code provisions for punishment having their origin in the Dark Ages, judges can do but little. Parliament alone can interfere. But in all these cases the provisions of the Code give to the judge of the land discretion; and it is, I think, our duty in all but very exceptional cases to exercise as a Court of Appeal our discretion by refusing to uphold sentences involving whipping.

While our knowledge as to positive and successful methods of reforming the offender is still incomplete, we are of the opinion that our resort to violence, even in the name of the law, is a confession of failure and futility. A distinguished prison medical officer, Dr. James Devon, formerly prison commissioner for Scotland, wrote,

By all means let us deal with our blackguards but let us deal rationally with them, not by whipping them in the hope that they will be good but by placing them under such conditions as will prevent them from doing ill. That they are cruel to others is no reason why we, who claim to be better, should prove ourselves as bad as they by indulging our cruelty.

Capital Punishment

In the course of its deliberations your committee will undoubtedly consider a considerable quantity of statistical evidence relative to the matter of capital punishment. It would appear, therefore, futile for us to add extensively to such material. Possibly the most convincing story respecting the efficacy of the death penalty as a deterrent to crime is the historical fact that in Great Britain, for example, the number of crimes punishable by death has been diminished over a period of many years without a corresponding increase in the rate of crime. The subsequent rate of crime cannot, of course, be attributed entirely to the severity of punishment but must take cognizance also of attending cultural and social changes.

There is some fear that the removal of the death penalty for crimes such as murder would remove a strong deterrent factor which would result in an increasing number of such offences. However, the presence or absence of

capital punishment would appear to have no relation to the commission of such crimes as homicide. Historically, capital punishment seems to be inconsequential as a deterrent.

This conclusion appears to us to be sound in the light of history. A little over a century ago Nicholas White, a boy of nine, was sentenced to death at Old Bailey in England for stealing two pennyworth of paint. Yet in spite of such stringent penalties for offences now considered trivial England's crime rate did not experience a decline. Conversely, with the abolition of the death penalty for a large number of offences, the country was not overwhelmed with lawlessness.

In the *British Journal of Delinquency*, Volume IV, Number 3, Mr. Gerald Gardiner, a British barrister, comments on the findings of the British Royal Commission on Capital Punishment. He observes in part:

It is difficult to read the 497 pages of this Report, which includes an examination of the result of the abolition of the death penalty in every civilized country in the world except British territory, France, Spain and some of the United States, without coming to the conclusion that murder is primarily a crime of those so disordered in mind that the deterrent effect of punishment is of no, or little, effect, that for this and other reasons severity of punishment does not appear in practice to have any real effect on the murder rate, and that the prospect of a decrease in murder in civilized countries must now primarily depend upon a combined assault by the medical and legal professions so that the disordered minds of those who, if not provided for in time, will commit murders in the future may at an earlier stage of their life be diagnosed by the doctors, and so that adequate protection from them may be provided by the law for the benefit of those who would otherwise be their victims.

Professor Thorsten Sellin, discussing the homicide rates in the United States, informed the British Commission that,

Whether the death penalty is used or not, or whether executions are frequent or not, both death penalty States and abolition States show rates which suggest that these rates are conditioned by other factors than the death penalty.

In the United States the six States which abolished capital punishment are among the ten with the lowest homicide rates.

In order to ascertain how effective a deterrent the death penalty really is one must know something of the make-up of the murderer himself, particularly at the time of his offence, and of the impulse under which he acted. There appear to be those who kill while mentally ill. These are out of touch with reality and can be no more deterred by the fear of the death penalty than they could were they to be threatened with death during a period of unconsciousness. Possibly the greater number of those who commit murder do so in the heat of passion during an episode of uncontrollable impulse at which time no thought is given to consequence. The very fact that our murder rates do not tend to vary greatly would appear to lend credence to the view that this group is not deterred by the death penalty. Indeed, it is doubtful that the act of murder would be consummated, if for a rational moment, the assailant were to give consideration to the ultimate consequence of his act. The residue of murders are likely to be committed in a calculated manner for some sort of gain either by a professional killer or by a person who had predetermined the act and determined that the objective is worth the risk. It is clear that the death penalty, which was part of the calculated risk, has not been a sufficiently strong deterrent where such murders occur. The obvious answer is that the killer does not intend to be convicted of

murder and sentenced to death. Should a murderer be apprehended and convicted, his offence proves to be unprofitable regardless of whether he is put to death or imprisoned for twenty years or life. In any event, whatever the impulse of the murderer, there is no real compensation for his taking life, nor any possibility of his reformation or restitution in some token way for the loss caused, by putting him to death. Possibly a small section of the community may experience a momentary feeling of satisfaction in that the ancient *lex talionis* has been satisfied. Incidentally, this attitude indicates that retribution and vengeance rather than deterrence and reformation, is still the guarantor of capital punishment. If it cannot be clearly demonstrated that this extreme penalty does in fact deter, since it cannot possibly reform, only one conclusion remains concerning its purpose, namely that of wreaking vengeance in the name of society. We have earlier expressed the view that this is not a purpose consistent with civilized exercise of justice.

It is our belief that the retention of the death penalty actually impedes the execution of justice. It would appear to do so in two ways. First, juries may be reluctant to return a verdict of guilty if it carries with it a mandatory death penalty. This can result in the rather casual treatment or acquittal of those who may be most in need of prolonged observation, custody, and treatment; and against whose acts society may require protection. Secondly, although under certain circumstances the court may be required by law to impose the death penalty, the commutation of the same is in the hand of the government administration of the day. The fate of life and death, therefore, lies in the hands not of a court in which discretionary powers are vested but in the hands of the federal cabinet.

A further cause of concern in this question arises from the fact that miscarriages of justice have occurred in Canada as the result of errors in the findings of the court. Within recent years two such instances, namely that of Ronald Powers and that of Paul Cachia, have received prominent attention. Both of these men were imprisoned for many months before the error of the court was discovered. If, by chance, a person had been killed in the course of the robberies for which these men were erroneously imprisoned, they may have been executed although they had no connection with the offences. This would not have been the first time that innocent people have been executed. The finality of this punishment makes justice impossible once an error has been made. Accepting the premise of those in favour of capital punishment, what should be the penalty exacted for the erroneous execution of an innocent person and who should be called upon to pay that penalty? This question cannot be lightly disregarded as mere rhetoric since the decision to impose death has been made by men of learning and training in jurisprudence, after long and deliberate calculation.

Again, as in the case of corporal punishment, the imposing of the death penalty degrades and desensitizes those who carry out the penalty. (One wonders, parenthetically, at the kind of life to which society consigns its official executioner—a life of endless, carefully planned murder and isolated anonymity.) The sensational news which surrounds murder trials tends to excite the basest emotions in the community, and if the community, at the time of sentence, is in sympathy with the imposition of the death penalty, this is so only as the result of inflamed emotion rather than a rational desire to have the objectives of justice intelligently served. The fact is that as countries have become increasingly civilized and sensitive to human values, the more reluctant they have been to exact the death penalty for crimes committed. It is reasonable to infer that society's enhanced view of the inherent value of human life itself is an influence in the culture which acts as a deterrent to those who might be inclined to take life.

It is noteworthy that many of the leading jurists, men of science, and penal administrators, have virtually crusaded for the abolition of the death penalty. They have used arguments similar to those which we have outlined above and in many cases have added strength to their arguments by virtue of personal experience in the administration of the system of justice. We are convinced that the death penalty is indefensible morally, judicially, and socially, and that its abolition in this country can only serve to prosper the ends of justice and good order.

The PRESIDING CHAIRMAN: Now, before the questioning of the witness begins might I inform you that this brief is supplementary to the answers to the questionnaires which was submitted by last session's committee to the Saskatchewan government; the answers to the questionnaires are in your book of evidence for last year at page 755.

If it is in order we will have questions starting with the Hon. Mr. Garson.

By Hon. Mr. Garson:

Q. There are one or two questions I would like to raise here to make sure that I understood the brief itself. On page 1 you say:

The countries of the civilized world, in short, are in substantial agreement that punishment of the offender *per se*, as an indication of society's vengeful feelings, is indefensible...

If you struck out the words "as an indication of society's vengeful feelings" would you still say that "the countries of the civilized world, in short, are in substantial agreement that punishment of the offender *per se* is indefensible"? I am trying to find out whether the sense of that sentence turns on the question of vengeful feelings. Are you in favour of punishing offenders or are you opposed to punishing offenders?—A. I see your point.

Q. I am just trying to find out what you mean in this sentence?—A. My feeling is that countries of the civilized world are coming to the point that on the basis of both experience and increasing knowledge, which is discussed elsewhere, that punishment itself appears to serve primarily as a means of exercising vengeance.

Q. Let me just understand that. You think that the countries of the civilized world are coming to the view that punishment of the offender serves only the purpose of vengeance?—A. No, but that that punishment *per se* has been the major element involved.

Q. Is it your opinion that vengeance is the major element involved in Saskatchewan?—A. No, I do not believe that.

Q. Or in any other part of Canada?—A. No.

Q. Do you think that the punishment of offenders is indefensible?—A. Perhaps I misunderstood you. The thing that is considered indefensible is the exercise of punishment for the purpose of vengeance.

Q. That is not what you say.

Mr. MONTGOMERY: I think it is what the brief says.

Hon. Mr. GARSON: "Are in substantial agreement that punishment of the offender, *per se*, as an indication of society's vengeful feelings". It is only in that sense that it is indefensible.

The WITNESS: Punishment *per se*, that is to say punishment for the sake of punishment; just in order to punish and that is all.

By Hon. Mr. Garson:

Q. In other words, punishment *per se* means in order to have vengeance alone.—A. Yes.

Q. Is indefensible?—A. Yes.

Q. Therefore I think you will say that punishment must serve some other purpose in order to be defensible?—A. I would, yes.

Q. What purpose would you say that would be, deterrent?—A. That purpose might be deterrent.

Q. That would be one?—A. And reformative or corrective if this is consistent with what is required to produce a correction in attitude and behaviour.

Q. In other words you would have no objection to punishment provided it is (a) a deterrent, or (b) corrective?

Mr. WINCH: Or (c) corrective in that this person should not be loose on society. Perhaps he should not be left in society and so has to be held in custody.

By Hon. Mr. Garson:

Q. Your objection to corporal punishment is that you say that it is neither deterrent nor corrective?—A. That is my feeling.

Q. There is one other sentence here. This is on page 11 of your brief:

The fact is that as countries have become increasingly civilized and sensitive to human values, the more reluctant they have been to exact the death penalty for crimes committed.

Would you say that Great Britain and Canada are countries that have not become increasingly civilized and sensitive to human values?—A. Oh yes. I would certainly agree that they have, and I believe that that is one of the reasons why both in Britain and Canada there has been considerable concern surrounding this problem. Although the step in terms of abolition has not been taken there certainly has been very considerable concern in assessing whether this should not be taken.

Q. That is right. Would you think there is any less degree of civilization and sensitivity to human values in countries like Great Britain and Canada which have not abolished capital punishment than in other countries which have?—A. I would say this perhaps may be one of those criteria which tend to indicate a level of civilization but certainly could not be taken alone. This might possibly add to the point. This is a quotation of part of a speech made by Sir Winston Churchill before parliament. I am sorry I do not know the date but it was relatively early in his political career:

The mood and temper of the public with regard to the treatment of crime and criminals is one of the most unfailing tests of the civilization of any country.

A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal against the state—a constant heart-searching by all charged with the duty of punishment—a desire and an eagerness to rehabilitate in the world of industry those who have paid their due to the hard coinage of punishment; tireless efforts toward the discovery of curative and regenerative processes; unfailing faith. That there is treasure, if you can only find it, in the heart of every man.

These are the symbols which, in the treatment of crime and criminal mark and measure the stored up strength of a nation and are a sign and proof of the living virtue in it.

That is the spirit in which I suggest this might be understood.

Q. But that is the opinion of a statesman whose country still retains capital punishment?—A. Very true.

Q. In other words, it is quite possible to retain capital punishment and retain the qualities Mr. Churchill speaks of.

Hon. Mr. VIEN: And remain civilized.

Hon. Mr. GARSON: Comparatively so.

By Hon. Mr. Vien:

Q. Could you tell me upon what you base your own opinions, or are you merely quoting those of others, as to the fact that both corporal punishment and capital punishment are in your opinion not deterrent?—A. Well, my personal experience with people who have suffered corporal punishment has not been extensive. We have in Saskatchewan had during my association with this program in the last seven years only two cases of corporal punishment imposed by the court to the best of my recollection. There was only one sentence involving execution which was upheld and which was frustrated by the suicide of the condemned. So therefore my experience is limited in terms of numerical quantity. However, I did have occasion to have contact with the two men who were sentenced to corporal punishment and to observe their feelings concerning it and also to observe, in the case of the condemned man who committed suicide before execution could be carried out, a very noticeable sense of relief which swept the entire prison population and the staff of the prison at his suicide. Then I have also had experience with young men who have been sentenced to the jail at Regina who had previously been confined in the boy's school as juveniles and who while there had apparently been paddled some years before.

By Hon. Mr. Garson:

Q. That was for discipline?—A. For disciplinary purposes. That is the extent of my experience in that respect.

The PRESIDING CHAIRMAN: Before you leave page eleven there is a sentence you have inserted in your brief:

This would not have been the first time that innocent people have been executed.

Do you mean executed in Canada or in other countries?

The WITNESS: I am not aware of any instance in Canada at all.

Mrs. SHIPLEY: Then it has no bearing.

By the Presiding Chairman:

Q. Could you tell us where these innocent people have been executed?—A. I have read of instances occurring in France, for example, and in the United States. I do not have them readily in my memory to tell you of them. I think the relevance of this observation, if I may come back to the objection that has been raised, is that if we can establish the possibility of error occurring in coming to a judgment then it is possible to conclude that error can be made also in capital offences which are not likely to be cleared up after an execution has taken place since there is probably no interest in doing so. I am not saying that such errors have occurred in Canadian history, but the possibility I think must be considered in fairness.

Q. In other words, if they happen in minor offences it is reasonable to conclude that they might happen in major instances?—A. Yes.

By Hon. Mr. Garson:

Q. Is that a fair assumption? Would you say from your observation of the administration of justice that the same degree of care is taken in relation to cases such as these which you have mentioned of Ronald Powers and Paul Cachia as is ordinarily taken in capital cases both by the Crown and by the

accused. Would you say that?—A. Certainly I would say that those who face the possibility of a capital sentence are given the benefit of the extent of the law in our country. But, I would think also that it would be fair to say that cases dealing with offences as serious as those for which Powers and Cachia were being tried would also be given very scrupulous care. I would assume that.

By the Presiding Chairman:

Q. Is that always the case when we have, for instance, in the province of Ontario a system of legal aid where any lawyer is picked out, of a panel and there is no fee whatsoever for the defence? I know that many lawyers in my own personal acquaintance have spent many dollars themselves for a defence of an individual. But, we also had evidence here that some of the solicitors who had defended persons accused of homicide were not quite competent, had had no experience; they did the best they could but they had no experience. Now then, is it always true that an accused, for instance, an accused who has no money whatsoever and has been accused of murder, gets the very best defence?—A. If the condition which you describe is the case, I would say that there must be instances in which he does not have the benefit of the defence which he should have. I was thinking, however, of the further safeguards in terms of the consideration of the commutation which automatically follows a conviction.

By Hon. Mr. Vien:

Q. Did I understand you to say that there was no evidence of any such error in Canada?—A. In capital offences.

Q. Therefore, it is only with respect to the possible danger of such an error being committed that you would recommend the abolition of capital punishment; it is one of the reasons?—A. It is one of the reasons, and although no instance that I am aware of has occurred in Canada that does not necessarily say that, if further investigation had been considered desirable because of the interest, say of the condemned person's family or friends, evidence may not have been produced ultimately showing that an error had been committed.

Q. I agree that that is so, but what I had in mind was this: would it be a fair reason to suspend capital punishment just on account of the remote possibility of a mistake? All human institutions have their own limitations and the exceptional mistake or error would not justify the staying of human institutions. For instance, take a licensed chauffeur. There are certain chauffeurs who will get intoxicated and will kill persons. But, because certain chauffeurs will abuse the privilege and will kill other persons would it be advisable to stop issuing licences in the case of any licensee committing such a mistake. I think that the recommendation is far too sweeping. In the first place in Canada where the administration of justice is highly respected by all the people in Canada, and where the performance of our tribunal is such that such respect is justified it would seem that it is too sweeping a recommendation.

The PRESIDING CHAIRMAN: Could we confine our remarks to the questioning of the witness rather than to the making of statements. We have to have a sense of order. However, you have proceeded, and may now continue with your question.

By Hon. Mr. Vien:

Q. Do you not believe that it is too sweeping a recommendation?—A. I do not, for this reason. Using your own example, there is considerable to justify the use of licensing practices as an effective method of accomplishing

what you set out to do. This is not necessarily the case in the use of the death penalty. There is no such evidence to my knowledge which makes it so effective and important that it should be retained when the possibility of error is present.

Q. I have another question to put, Mr. Chairman. It is this. Did I understand correctly that you recommend the abolition of corporal punishment because it exasperates and hardens the offender without producing a reduction in the number of offences?—A. That is correct.

Q. Then, if you recommend seclusion, incarceration and other treatment, will it not, to a certain degree at least, also exasperate and harden him?—A. That is a difficult thing to answer in a general way, sir, because our view of the whole question of the treatment of the offender is based upon the assumption that we need to know what it is that constitutes the cause for the committing of offences in each individual instance. Until we know this we are not in a position to prescribe and carry out a plan of treatment which is going to be consistent with the cure or the correction of the offender, and therefore the added protection of society. It may be that in the treatment of the offender there will be many elements involved which may be somewhat disagreeable and distasteful to the offender. That is perfectly true, but they may at least be consistent with the requirements for bringing about a desirable change in him, in the last analysis.

Q. You have compared the statistics in various countries. Could we not draw a parallel? If you take minor offenders, who have been incarcerated and have become recidivists and are again offenders, is it not a fact that their incarceration has in many cases exasperated and hardened them?—A. I would agree with that.

Mr. WINCH: Could the other members of the committee have a chance, Mr. Chairman?

Hon. Mr. VIEN: Gentlemen, if I have abused my privilege, I am sorry.

The PRESIDING CHAIRMAN: Proceed, Colonel.

Hon. Mr. VIEN: Have I abused my privilege?

The PRESIDING CHAIRMAN: Not at all.

Hon. Mr. VIEN: I do not want to offend any member.

The PRESIDING CHAIRMAN: I think the interruption was quite unintentional. If you will just put your questions to the witness, it would be appreciated.

By Hon. Mr. Vien:

Q. I wanted to find out if your recommendation is to abolish all punishment that would exasperate or harden the offender?—A. I would be in favour of abolishing all types of punishment, treatment, or whatever else you may call it, that hardens the offender or in any way is likely to contribute to a continuation of the attitudes in him which cause him to commit crimes. Admittedly, we do not know all the answers and we probably will not for a great many years, in terms of the specific way in which to bring about a positive change in attitude and behaviour in the offender, so that we are likely still to make mistakes, but I feel that we should not make them knowingly aware that we are likely to be doing the wrong thing.

Q. I understand your point.—A. I do not pretend for a moment that the things we feel in all conscience and in good intelligence are the best things for the offender and for society are not likely at times to exasperate the offender and make him quite unhappy.

The PRESIDING CHAIRMAN: Just let us understand a few things here. As I understand it, Mr. Fornataro has been invited here as our guest and he has come a long distance. If it is necessary that we have a subsequent meeting

in order to complete the examination, we will have a subsequent meeting, but in the meantime I think that all committee members should have the fullest opportunity of questioning Mr. Fornataro as completely as they wish, so long as there is not too much repetition or the making of statements rather than the asking of questions. That is my understanding. If there is anything that I do not understand about this practice, now is the time to say so.

Mr. WINCH: What I had in mind was this, Mr. Chairman. After all our sittings in the past year, I think we worked out a very good system, one which has worked most efficiently, that of beginning at one end and going through the members and at the next meeting beginning at the other end and going through the members.

Hon. Mr. VIEN: I must apologize to honourable members if I have been infringing on the rule, as I did not know it. I was made a member of this committee only very recently.

The PRESIDING CHAIRMAN: No apology whatsoever is necessary, Colonel. I permitted the questions. The general rule is that we begin at one end of the table, but I notice that quite often there are interruptions by other members, and so we cannot be too strict.

Mr. WINCH: I may say that I have no questions to ask, and so I have no ulterior motive.

Hon. Mrs. HODGES: I cannot believe that you have no questions to ask.

The PRESIDING CHAIRMAN: If we understand one another, let us proceed.

Miss BENNETT: Mr. Fornataro, it seems to me from reading your brief that you have dealt very extensively with the criminal himself and with those who punish him. I would like to have something of the viewpoint of society. For instance, we have 14 million people who are not criminals, and I would like to know what your viewpoint is as to the effect of this on society.

The WITNESS: I believe that that is mentioned in the brief. We are not primarily concerned—

The PRESIDING CHAIRMAN: Mr. Fornataro, would you talk to Mr. Cameron at this end of the table, please? Conversing with Miss Bennett is very pleasant, but we cannot hear you at this end.

The WITNESS: We are not primarily concerned with the fact that one form of punishment or another may be distasteful to the offender himself, nor to those charged with the implementing of it. The premise on which we start is that a system of justice ought to be effective in providing protection to the community. Now, it is my belief that neither capital nor corporal punishment necessarily provides us with the kind of safeguards which we traditionally have believed they do. If I can be convinced, I am certainly open to conviction, that these do in effect provide us with very effective deterrents and protection. I would be quite happy to subscribe to them, but it would appear to me that in the interests of the protection of the community we should be concerned with so modifying our laws, and specifically the Criminal Code, that those things which may promote lawlessness or at least allow it to continue should be removed or modified and those things which might actually be positively employed to curb lawlessness should be reflected by changes in the Code as well. It is certainly with the welfare of the community and the law-abiding section of the community in mind that these suggestions are made.

Miss BENNETT: In preparing this brief, did you go into a close examination as to whether the punishment is or is not a deterrent?

The WITNESS: In my reading of the material which has been available, I have come across nothing to indicate that it did actually deter. As I say, I am open to conviction on the matter, but I have not come across that data as yet.

Mrs. SHIPLEY: In the course of your brief you used the term "vengeance" describing the attitude of society in respect to both corporal and capital punishment. You state that that is the sole purpose in various ways throughout your brief. It is a matter of opinion. On page 11 you state:

Society consigns its official executioner to a life of endless, carefully planned murder.

Now, as murder means unlawfully killing a person with malice aforethought, surely you did not mean quite what is says here, did you?

The WITNESS: I see your point, and it is well taken. Certainly there is no malice aforethought, but it is calculated killing. That is really how it should have read.

Mrs. SHIPLEY: All right. I have one other question, if I may ask it.

The PRESIDING CHAIRMAN: You may put as many questions as you like.

By Mrs. Shipley:

Q. You state quite emphatically that you do not believe in corporal punishment for any reason whatsoever and that under no circumstances does it do any good but it does only harm. In order that I may understand your thinking in this matter, I wonder if you would mind telling me if you are also of the school of thought that believes that no form of punishment, even mild spanking, is necessary in the rearing of children?—A. I do not subscribe to that school of thought.

Q. You do not?—A. No.

Q. Therefore, you do admit that it is necessary to inflict a just amount of corporal punishment in raising small children?—A. I agree with that, but I find a very great difference between the imposing of physical disciplines by parents—

The PRESIDING CHAIRMAN: You mean, immediately?

The WITNESS: Yes, immediately. And the imposition of corporal punishment judicially by a court.

Mrs. SHIPLEY: Then you do not believe that there are certain criminals—I will not go into the types but you know the type I mean—who fear nothing in this world but physical pain and who are quite hardened. You do not believe that there are certain ones who fear physical pain only?

The WITNESS: I believe that that is quite true, but I do not believe that they are necessarily deterred from their criminal activities simply because there is the possibility that they may suffer some sort of physical pain.

Mrs. SHIPLEY: Thank you.

By Mr. Johnston (Bow River):

Q. My thought has been running along the same lines as Mrs. Shipley's, but I wanted to confine myself to the judicial aspect of it and not to the family aspect. I take it that the witness is of the opinion that corporal punishment should be abolished?—A. Yes.

Q. And that any degree of corporal punishment should be abolished?—A. Perhaps you would have to spell that out, so that I could understand what you had in mind.

Q. The first statement I made, if you will excuse me, is rather broad. I asked if you disagreed with corporal punishment, and you said you did. I wanted to get a little more precise answer when I asked if you disagree with any degree of corporal punishment.—A. When we speak of corporal punishment, we are referring to the imposition of a judicial sentence which involves whipping or flogging or paddling, or whatever other term you may wish to use. You may be referring to other types of physical privation under the broad term of corporal punishment; I do not know.

Q. You bring another thought to my mind. For instance, it is not always true that flogging could be the worst type of punishment.—A. That is true.

Q. I have in mind solitary confinement. Would you do away with that too?—A. I think that in some cases it is very essential. Some day we may find ways of doing things that are much better than now and we may find that we do not need that.

Q. But up to the moment you would not do away with it?—A. No.

Q. You would keep that as a form of punishment?—A. That is correct.

Q. I think that could be classed as a form of punishment, mental if you wish, but certainly a form of punishment.

The PRESIDING CHAIRMAN: What do we understand by "corporal punishment"?

Hon. Mr. GARSON: Corporal punishment is the infliction of pain either by official decree or as a disciplinary measure in the prison itself, and I think we should stick to that.

The WITNESS: Either the lash or the paddle.

By Mr. Johnston (Bow River):

Q. I take it that the witness is against those types mentioned by Mr. Garson. On page 4 of your brief you quoted the Gladstone Committee as upholding your opinions. You say:

The judgment of the Gladstone Committee of 1895 in Britain was that the *certainty* of punishment, rather than its severity, constituted its deterrent value.

Are you of the opinion that we should have laws upholding punishment but not use it? I think it is clear there that it was the certainty of it, not the actual implication of it, that created the deterrent?—A. It was not the fact of lashing or whipping.

Q. It was the prospect of it?—A. No, it was the certainty of apprehension and conviction.

Q. Of what?

The PRESIDING CHAIRMAN: The individual.

The WITNESS: Being convicted of the offence.

Hon. Mrs. HODGES: You mean apprehension in the sense of being apprehended?

The WITNESS: That is right.

Mr. JOHNSTON (*Bow River*): Probably I misunderstood it when it says the certainty of the punishment but not the punishment of an offender.

The WITNESS: That is the point.

Hon. Mr. GARSON: Might I suggest this? Is this not clearly what was meant, that it is the certainty of apprehension, trial, conviction and punishment by incarceration, but not necessarily corporal punishment?

Mr. JOHNSTON (*Bow River*): But we are confining our remarks to corporal punishment.

Hon. Mr. GARSON: Yes.

By Mr. Johnston (Bow River):

Q. Therefore this quotation refers to corporal punishment?—A. It is the certainty of punishment, not corporal punishment.

Q. In the statement he uses to bring out the point, he is quoting from the Gladstone Committee, which has pointed out clearly that it was the certainty of corporal punishment.—A. No, it was not; I am sorry.

The PRESIDING CHAIRMAN: In my opinion we are getting into arguments and discussions without questioning the witness to find out what his knowledge of the matter is. What we want to do is to find out what the facts are. If you do not agree with him, we will argue that out later.

Mr. JOHNSTON (*Bow River*): I am just pointing to a quotation which he used to convince us of his viewpoint and I wanted to find out the certainty in his mind relative to this quotation.

The PRESIDING CHAIRMAN: Ask him a question, then the witness will answer it, and we will accept his answer. In argument, you and I and the rest of the members of the committee will fight it out later.

Mr. JOHNSTON (*Bow River*): But first of all we have to know what he understands by the words of this quotation.

The WITNESS: The statement is that the committee was of the opinion that the certainty of punishment, in other words the certainty of being punished, not its severity or its form was the deterrent thing.

Mr. JOHNSTON (*Bow River*): I accept that statement. Mr. Chairman, that is the only question I had in mind. I wanted to be sure on that point.

By Hon. Mrs. Hodges:

Q. On page 12, the final sentence of the brief states:

We are convinced that the death penalty is indefensible morally, judicially, and socially, and that its abolition in this country can only serve to prosper the ends of justice and good order.

I would like Mr. Fornataro to comment on the fact that in Victoria last year the moderator of the General Assembly of the Presbyterian Church in Canada preached a sermon in his church in which he said:

We would affirm the right of the civil magistrate to impose the death sentence for crimes like malicious and deliberate homicide. The state is given this right as the minister of God, and it shall have this right as long as evil continues to disturb the social order.

I would like to ask the witness' opinion on that, and I would like to add that three other clergymen of different denominations confirm it.

The PRESIDING CHAIRMAN: Could you give us the publication from which you are reading?

Hon. Mrs. HODGES: It is the *Victoria Daily Colonist* of July 6, 1954. I would like the witness' comment on that.

The WITNESS: The only thing I have to say is this is a point of view and I disagree. It is a point of view to which undoubtedly not only many clergymen of the Presbyterian church but of a great many other faiths would subscribe and to which some others would take exception. I would certainly take exception.

By Hon. Mrs. Hodges:

Q. The question of deterrence again comes up. I notice it is dealt with by you in exactly the same way as by other advocates of the abolition of capital and corporal punishment. You are speaking of the deterrent effect upon those who receive it. What is your position as to the deterrent effect on the rest of society?—A. I realize that is a question which does not lend itself to proof either one way or another too well. However, on looking at the statistics which are available—

Q. In spite of the fact that you yourself do not believe statistics.—A. I am not saying that these should be relied upon exclusively. I merely say that they may sometimes give indications one way or the other. There does not appear to be from statistical evidence a strong indication that people are deterred from committing murder, for example, in the States say where there is a death penalty in contrast to those states which do not have the death penalty. I do not think that a person in favour of the death penalty or a person who is against it can take these figures and prove anything.

Q. That is my point.—A. They merely can say that you cannot prove anything.

Q. Yes.—A. Therefore, I take the view that you cannot prove that it is a deterrent either.

Q. The emphasis is always laid on the fact that it is not a deterrent.—A. It appears to me that traditionally we have accepted almost without question that there is a deterrent efficacy about the death sentence and about corporal punishment which is almost an axiom. Naturally it is there we assume. Unless there is some very strong evidence to show that it does in fact exist we should not take it at face value.

Q. It is impossible to know the workings of the human mind. I am only bringing it up to say that the emphasis which is always laid in these briefs and expositions in favour of the abolition of capital punishment is inevitably that it is no deterrent.

The PRESIDING CHAIRMAN: Is it not also true in the converse? Those who advocate capital punishment always say it is a deterrent.

Hon. Mrs. HODGES: That is the point I am making. They usually try to adduce proof and quote statistics.

The PRESIDING CHAIRMAN: It depends where you are sitting.

The WITNESS: It appears to me this way, that what happens to one person, because of his actions, as a form of punishment should always be looked upon very cautiously as a means of deterring other people because the deterrent effect of any experience or lesson that we may undergo is always diminished greatly for other people. How many of us, for example, have stopped smoking because we heard of somebody who smoked and died of cancer; how many people have stopped speeding on the highways because they have passed somebody else who was speeding and cracked up?

Hon. Mrs. HODGES: We do not know.

The WITNESS: My point is this, that while some people may take a very personal lesson from these experiences and may be very personally exercised about it, the average among us, it seems to me, go about our lives with the feeling: well, this happened to the other fellow but it will not necessarily happen to me; I enjoy doing what I am doing; or I do so because of the situations I meet and it is a calculated risk I am taking.

Hon. Mrs. HODGES: Thank you.

Hon. Mr. ASELTINE: I would just like to ask the witness a question. Saskatchewan is 50 years of age this year and celebrating its golden jubilee.

Now, during those 50 years can you give us any statistics as to how many cases of corporal punishment in the nature of lashes and that kind of thing have been imposed by the courts?

The WITNESS: I am afraid I cannot, offhand, unless they are recorded.

Mr. WINCH: They are to be found in the appendix.

The PRESIDING CHAIRMAN: If you look at your notes for last year's evidence you will see that they are printed and bound in the book and I think you will find that Saskatchewan is one of the provinces which returned our questionnaire with the answers.

Hon. Mr. ASELTINE: They answered it in the questionnaire?

The PRESIDING CHAIRMAN: Yes.

By Hon. Mr. Aseltine:

Q. You gave testimony a moment ago to the fact that during your experience there had only been two; did you investigate those criminals who had been sentenced and did you talk with them?—A. I did.

Q. And what did you find out?—A. I found this: that both of them were relatively young offenders and they were certainly apprehensive of the experience they were to undergo. This was a new experience for them, as a matter of fact.

Q. Was that before the penalty was imposed or afterwards?—A. I am dealing with both here; in fact, in one instance it was the first encounter this man had ever had with the courts at all.

Mr. FAIREY: What was the crime?

The WITNESS: The crime was that of attempted rape.

By Hon. Mr. Aseltine:

Q. And how old was he?—A. He was twenty-three. He did have a real fear of physical pain; and as one of the members suggested earlier, this, it seems to me, was the thing that was uppermost in his mind; and after the infliction of the penalty he was sullen about it and seemed to feel that this was really something that was hardly fair, and that he had not been given the benefit of some sort of provision by the court, which was less harsh. I would think that in this case it was his own revulsion against the physical aspects of it that were most significant to him. I do not know what his subsequent career has been because I have not heard of him since.

Q. You cannot say whether it made any difference to him or not?—A. To the best of my knowledge he has not been sentenced again. And I think this is something which we ought to remember on occasion, because we did know also after he was sentenced to jail that although he had not previously acquired a record, his record of performance in the community was not so clear.

Mrs. SHIPLEY: Did you investigate the girl?

By Hon. Mr. Aseltine:

Q. Tell us about the other case?—A. In the case of the other chap, he had once been in jail for a previous offence; and on the second offence he was sentenced to be lashed at two points during his sentence; one early after his sentence began and the last time shortly before he left.

Q. Was that for a first offence?—A. No. This was for a second offence.

Q. What was the charge?—A. The offence was that of incest. I saw him shortly after the imposition of the second set of lashes and that was shortly before he was discharged. Now, this chap did not show evidence of feeling any great amount of hostility or bitterness about this and the reason

for it, as far as I was able to determine, was the fact that no staff in the institution apparently had the heart for the whole business; and this raises further problems, it seems to me. The deputy warden who had a long history as an officer in the institution certainly had a custodial and punitive point of view historically from his own experience; and he was one of the most vocal people in feeling unhappy about having to carry out the sentence in this way. He explained that this man had been there for over a year and had been a good man; that he had progressed during his time in the institution and that he seemed to show favourable response.

Q. That might have been because he got the lashes in the first instance?—A. Just on the eve of his discharge he was to be lashed. Now I think that that feeling on the part of the staff helped to relieve possible bitterness and ill-effects in the prisoner, but on the other hand I wonder what his attitude towards the constituted authority of society may be, and that is one of the things I am unhappy about in this respect.

Q. What is your opinion, then, about the deterrent effects of these punishments?—A. I do not think that corporal punishment, itself, had any effect whatsoever as a deterrent.

Hon. Mr. FARRIS: Might I ask one question, Mr. Chairman?

The PRESIDING CHAIRMAN: If you will please wait for a minute, Mr. Farris, we will come back to you.

Now, Mr. Montgomery.

By Mr. Montgomery:

Q. I would like to ask the witness if the standard of intelligence of these two men would have something to do with it?—A. I do not think it was a question of defective intelligence in those two cases. The first man would have just average intelligence, I would say; and the second one might be of dull-normal intelligence; in other words, he was certainly not defective; but he was not average in terms of his brightness.

Q. I understand you have no way of telling us whether this had any reforming benefits when either one of them went back into society.—A. I would say the only way in which you could be certain of that would be to have some method whereby we could keep in touch with these men periodically for a given period of time following their discharge, not in a routine way but in a fairly intimate way so that there is some opportunity of forming a pretty accurate judgment as to their attitude and their behaviour. That would appear to me to be the only reasonable way of satisfying oneself as to the subsequent behaviour and character change, if any, that has occurred.

Q. Can you tell us, from your experience—or do you feel that this type of accused person would prefer to take the lashes at a couple of spots rather than to be confined for a longer period?—A. I think you would find there was a difference based upon individual differences.

Q. You mean depending on the individual?—A. I think that some might be very happy to say: "I will take the lashes and let us get it over with; I want to get out of here as fast as I can." Not necessarily because he is going to be a better person.

Q. No.—A. And that is a thing we should concern ourselves about at the same time.

Q. In other words, punishment should look more toward reform than just giving the same as you get.—A. That is correct. I would be much more in favour of having an offender kept under custody for a longer period of time, indefinitely if necessary, until there is a reasonable assurance that he

is not likely to be a menace to society upon discharge, which is not assured to us simply because he has undergone sentence and may have undergone corporal punishment.

Q. In other words; some people or some prisoners who spend two years in jail or in the penitentiary may become reformed while others would not become reformed even if they got twenty years.—A. That is correct.

By Mr. Montgomery:

Q. I have just one question and it has to do with capital punishment. It deals with the type of criminal who premeditates his crime and thinks it out. I think we all accept the fact that the very fact that he may be convicted and hanged is going to deter him. How in your opinion will you handle that man if we do away with the death penalty? Do you think from your experience and the study you have made that there is any use in trying to reform at least some of those people? I am thinking of possibly the most desperate type?—A. I would agree with the suggestion which I believe is implicit in your question that in some such cases the prospect of reform is very very dim. We certainly are quite aware of the limitations in that respect and we may not be able to hope for reform but it would seem to me that we should be very sure of some quite direct benefits coming from the death penalty if we are to retain it because it is so extreme and so final.

Q. That is true. On the other hand, if you confine that man, say for life, he may then go on and continue committing murders?—A. If he is confined for life?

Q. He may get out and there is the possibility of his killing guards in prison?—A. It is quite possible, but again, going only on the basis of any material which I have been able to see, I have been rather impressed with the sparsity of that sort of thing. Life sentenced prisoners are very commonly referred to by prison administrators as people who behave themselves in prison rather than people who become dangerous in terms of committing further murders.

Mr. WINCH: Can we remind ourselves of the information that was given us last year by Mr. Garson on this very matter concerning those who had been released on homicide charges?

The PRESIDING CHAIRMAN: That is in the evidence of last year. Mr. Boisvert?

By Mr. Boisvert:

Q. You start your brief with the words: "The government of Saskatchewan believes..." What makes you think that the government of Saskatchewan believes that the Criminal Code of Canada should be amended to abolish capital and corporal punishment?—A. You really want me to recapitulate the entire brief then, do you?

Q. No, but is this a brief prepared by yourself or by the government of Saskatchewan?—A. I am presenting it on behalf of the government of Saskatchewan.

The PRESIDING CHAIRMAN: This, Mr. Boisvert, is supplementary to the answers to the questionnaires which we sent out to the various provinces last year.

Mr. BOISVERT: And the questionnaire was addressed to the attorney general of each province?

The PRESIDING CHAIRMAN: Yes, and we have the supplementary answers today. This follows up along the lines of the answers given to our questionnaire.

By Mr. Boisvert:

Q. I am coming back to the question asked by the Minister of Justice and at the bottom of the first page of your brief you say: "The countries of the civilized world, in short, are in substantial agreement that punishment of the offender, *per se*, as an indication of society's vengeful feelings,—” Could it not also be true that in the pursuit of justice society did not act with vengeful feelings?—A. I think where that is true that this is accepted as legitimate. The objection of the civilized countries in keeping with this is that where punishment in fact is an indication of vengeance that that would appear to be inconsistent with our present standards of civilization.

Q. Could we not say then that the civilized countries which retained the death penalty are doing so not because they have vengeful feelings, but because they are seeking to have justice rendered for society?—A. It may well be that that is the reason we give.

Q. I continue reading the completion of that sentence in your brief where you say: "—is indefensible and must give place to systems of individualized justice whose aim is the effective protection of society by means of correcting the offender." I would like to have you explain what you mean by "individualized justice"?—A. This is possibly the term which is most used to describe the change which has taken place in the development of penal systems during the present generation.

Whereas traditionally the treatment of the offender was very much based on the idea of meting out punishment for the sake of punishment or for the sake of confining him under custody because he had committed an offence and punishment was usually considered in relation to the seriousness of the offence or the man's record, now we are becoming more and more concerned with an attempt to individualize justice. That is, to come to some understanding or assessment of the individual offender and the reason for which he commits offences so that with that understanding of him as a person and a person with specific defects or troubles, a remedy can be conceived and applied which may have some chance of modifying his attitude and behaviour.

It is much the same development, it seems to me, which took place many years ago in the field and practice of medicine. I understand that many years ago doctors were referred to as leeches because they had one standard remedy for all patients and all patients had a leech applied to them to draw blood. Now, that would be unthought of today because the doctor is concerned with studying his patients and with coming to an understanding of the history of any malignancy or pathology, not only to look at the symptoms which may be significant but to understand what the conditions are which underly this symptom so that he can get rid not only of the symptom but can treat the causes and possibly thereby cause the symptoms to cease not only now but in the future.

It is this treatment of the individual person as a means of bringing about a change that is referred to here.

Q. In other words, if I understand you correctly, society should forget about the murdered person and the ill effect of the murder and think only in terms of the one who has committed the murder. That is what you would call individualized justice, is it not?—A. Well, of course, that is the effect of it, it is perfectly true. But while your attention is focused upon the offender, you do not callously ignore the person against whom the offence has been committed. You are interested in bringing about such a remedy that in future the community about which you are concerned will have more ample protection.

Q. Do you not think that your aim is reached by the history of the case made by the Department of Justice in a case of murder after the sentence has been passed by the court? Do you not think that the Department of

Justice studies all the circumstances of the case and goes into all the facts which may have brought the murderer to commit his crime?—A. I do not think that that is really what we are thinking here.

Q. I know that, but I am trying to get my mind in order with respect to your brief. What I am asking you is, if the aim you are seeking is not covered by the restudy of the case after sentence has been passed—A. I would wonder about it, because I would doubt very much that the Department of Justice or the members of the cabinet could possibly go into the matter in sufficient detail in terms of the individual person and his particular deviation to be able to come up with a plan that might be constructive. Now, I may be wrong in that.

Q. Can we not then say that what is done by the Department of Justice is individualized justice?—A. I am not intimate enough with it. Since there is no personal contact, however, I would wonder about it.

Q. I would like to ask you another question. On page 2 you say:

Criminal behaviour is not the private responsibility of the individual offender alone.

—A. Yes.

Q. May I deduct from that wide assertion that society *per se* is also a partner to the crime which was committed by the murderer?—A. That is not only implied, but stated.

Q. When crime was committed at the beginning of humanity, when Cain killed Abel, his brother, there was no society at that time?—A. I do not think that you and I had better get into a theological discussion, because I am not a literalist.

Q. Would you recommend the abolition of the death penalty for treason?—A. Although treason has not been singled out, I would say that the objections which are sustained here for amending the death penalty for murder would also extend to any offence. We are not thinking of the offence as such. There might be many other recourses suggested for an offence such as treason, for instance, banishment or life imprisonment, under conditions which may differ from other offences. We were not attempting to exhaust what might be done but merely to put forth our feelings against capital punishment.

Q. Are you aware that in those countries which repealed the death penalty, that penalty has been revived for crimes of treason and similar crimes against the state?—A. I realize that death penalties are imposed very lightly in some countries which nominally do not have the death penalty, that penalty itself being surrounded by political implications.

Mr. BOISVERT: We could open quite a discussion about this matter. That is all, thank you very much.

By Mr. Cameron (High Park):

Q. I think we are agreed, Mr. Fornataro, that the purpose of criminal law is to protect society, and we are also agreed that the basis on which the offender is given his sentence is, first of all, punishment; secondly, a warning to deter others; and, thirdly, reformation. Does it not get down to the fundamental question of whether capital punishment and corporal punishment are too severe? When we sentence someone to be lashed, that need not be vengeful. It is to impose upon him pain which he has possibly caused to other people. Are we being too severe, in your opinion, in doing that?—A. It is really not the severity.

Q. It should be imposed as soon as possible after the person has been convicted, and not, as you suggested it was, be retained over a period of a sentence?—A. The matter of severity might apply in connection with the

capital penalty, but I am not too concerned with the severity of the penalty itself, when we are talking about corporal punishment, but rather its effectiveness. As someone, I believe, mentioned earlier, other forms of physical deprivation may be considered much more rigorous than corporal punishment, but if they have the possibility of being effective as deterrents or as corrective agents then I would be in favour of them. It is the ineffectiveness of corporal punishment.

Q. Do you think it may be prejudiced when it comes to corporal punishment? What about capital punishment, where a murder has been committed, premeditated and carried out in a calculated and cold-blooded manner? Do you think that society is being too severe or is acting on inflamed emotions when it says that this man or this woman deserves death?—A. I believe that that is really what it boils down to ultimately. It is because we possibly feel somewhat murderous at the thought of such a calculated type of killing.

Q. Why do you say that we feel murderous? I am suggesting to you that society has to make up its mind whether this is a proper punishment to be given to such a person. When it makes up its mind, is it being too severe when it says that there should be capital punishment or some other traditional form of punishment?—A. I believe that it is too severe.

By Hon. Mr. Garson:

Q. Mr. Johnston opened up what I think was a very important matter, and I would like to see if I have drawn the proper inferences from the exchange which took place between you and him. You quoted the judgment of the Gladstone Committee in Great Britain to the effect that it was the certainty of punishment rather than its severity which constituted its deterrent value. I inferred from your remarks that you probably had in mind the fact that in some jurisdictions which I will not identify—some of them on this continent, as a matter of fact—in which there is both corporal punishment and capital punishment, the administration of justice has been marred by such inefficiency and political influence and so on that the criminal, although he knows that these punishments exist, thinks that there is a very good chance, and there is in fact a very good chance, that a sentence for such punishment will never be imposed or, if it is that perhaps he will get a political pardon, and the sentence will not be enforced. Therefore the inherent deterrent value of corporal punishment and capital punishment would be completely washed out under those circumstances?—A. That is right.

Q. Let us assume a hypothetical jurisdiction, in which the administration of justice is carried on with the efficiency that exists, say, in Saskatchewan or any other Canadian province, and in which the criminal in making his plans knows that there is corporal punishment and capital punishment and knows that there is a very good chance because of this efficient administration of justice he will be found guilty and that his chances of being forgiven will be on the strict merits of his own case. Now, I inferred, and correct me if I am wrong, that in those cases you said in your view corporal punishment and capital punishment had no deterrent value.—A. That is my feeling.

Q. Yes. Well, is it anything more than a feeling?—A. Well, it is again based on the experience, limited admittedly as it is, which I have had with people who have undergone corporal punishment.

Q. That is of two people?—A. Yes, plus juveniles who have graduated into senior institutions.

Q. As an experienced civil servant and university graduate you would not derive a general rule from two cases, would you?—A. Of course not.

Q. I understood you to say that you did not think that capital punishment was a deterrent and that there were not statistics to prove or disprove that proposition?—A. Yes.

Q. In other words, would you not agree that a citizen, contemplating or planning a murder or any other offence for which capital punishment is imposed who considered and rejected it because he was deterred by his fear of capital punishment, never become a statistic?—A. That is correct.

Q. You would go along with that?—A. Certainly.

Q. Would you say, leaving statistics aside, that you yourself prefer not to be hanged?—A. I would prefer not to meet death in any way if it were possible.

Q. Yes. You would prefer not to be hanged as a criminal?—A. That is correct.

Q. And would you say that a criminal, who is contemplating a crime in a jurisdiction in which the administration of justice was efficient and the certainty of his conviction was fairly probable, would not be deterred by the prospect of being hanged for the crime that he was planning? As a matter of ordinary common sense do we prefer to be hanged, or not?—A. This matter of common sense is the crux of the matter it seems to me. You and I are in a difficult position to assess this matter of its deterrence on the person who actually does commit murder simply because we are not people who commit murder. It would appear to be a difficult thing for people who have grown up under normal circumstances to put themselves vicariously, in a fairly genuine way, in the position where the murderer stands, who may or may not be mentally responsible; who may have acted under impulse and passion which we are not able to appreciate rationally and coolly, and the only persons upon who we can speculate, it seems to me, in terms of this deterrent matter, are those who had calculated in a cold way.

Q. In other words your distinction serves as a rough division, you would say, and that perhaps in the majority of cases in which the murder was a crime of passion or of impulse, that capital punishment is not a deterrent?—A. I think so.

Q. But where a man was planning an armed robbery, it might be a deterrent in a case of that kind, and that appears to be supported by statistics. Most of this sort of crime is committed in those jurisdictions in which they either have no capital punishment or where, having no capital punishment, the prospect of conviction is pretty remote.—A. I do not know of statistics to support the view that you have expressed.

Q. We have had some statistics before this committee as to the murders on one side of the international boundary at Windsor, and in Detroit on the other side where, I believe, they have no capital punishment, but where the question of certainty of punishment came into the picture.

What about the early days in the western United States and Western Canada? Have you examined those days to find out or to develop any opinion as to why it was that western Canada was developed with very few crimes of homicide, while there was a large number of them in western United States. Have you ever examined that at all?—A. No, I do not believe I have.

Q. That may be an interesting thing for you to examine. And have you ever examined the situation in the early days in regard to the number of murders on each side of the border, between Alaska and the Canadian Klondike?—A. No.

Q. Well, I recommend it to you.

The PRESIDING CHAIRMAN: Do you think anybody who is about to commit murder, stops to realize which jurisdiction he is in?

The WITNESS: I would go along with the hon. minister's inference that it is a possibility in some cases, but that is as far as I would go.

The PRESIDING CHAIRMAN: Suppose it is a murder of passion.

The WITNESS: I do not think so, no; I do not think the minister meant that at all.

Mrs. SHIPLEY: Might I ask the Minister a question? You said today that very, very few people are executed by hanging in Canada when the crime has not been premeditated.

Mr. MONTGOMERY: Isn't that one of the reasons that crime of murder must be premeditated or it will be manslaughter?

Hon. Mr. GARSON: I would prefer to answer a question of that sort after an examination of the statistics and in terms of actual numbers. And when you say "very, very few", I would hesitate to use that term because people differ as to what are "very, very few." That varies a good deal, and we should get the figures. I submitted a great many of them when I made my presentation. To be accurate we should get the figures. You are quite right in thinking that in considering commutation in those crimes of passion very careful consideration is given to the fact that the person's record is perfectly clear and that there was no premeditation. That has an important bearing upon commutation.

Mr. LEDUC (*Verdun*): Mr. Chairman, I shall read to you from volume 32 of the Canadian Bar Review, No. 5, dated May 1954, at page 494, where Mr. Justice Mackay of the Court of Appeal of Ontario said in his remarks.

The irrevocable character of the death penalty is a reason for taking every possible precaution against injustice—not for its abolition. Today, with the emergence of the armed criminal and the marked increase in armed robberies, old offenders are bound when apprehended to receive long sentences, yet if they run no risk of being hanged when convicted of murder they would shoot police officers and witnesses with no more serious prospects before them, in the words of one of them, than of "being boarded, housed and clothed for the remainder of their lives". Moreover, once in prison, these desperate characters could murder prison guards and fellow inmates with comparative impunity.

In the light of this citation, do you feel from that, if capital punishment is abolished, the public will receive enough protection?

The WITNESS: I respect the judge's right to his view although I do not agree with it. I do not know if he has the evidence to back up the statement that he makes. What proof is there for example that there would be an undue amount of murder of police officers if there were no death penalty and so forth? I do not know on what grounds the statement is made, or the statement that there would be killings in the gaols and that sort of thing. Certainly there has not been any evidence brought to my attention which would tend to bear this out. I do not think that I could put my hand on it immediately, but I believe one or more previous witnesses has already brought to the attention of the committee during the last session, a statement of one of the justices in England made during the time when they were considering the raising of the amount for which a person might suffer death to a shilling or something of that sort. I forget the exact situation but it was pointed out that this justice made a very strong plea during the debate on this bill pointing out that a person would not feel safe at all to leave his home if a person stealing up to five pence of goods were not subject to hanging. Now, the man who made this statement was undoubtedly a very competent barrister and judge.

The PRESIDING CHAIRMAN: You will find that in Professor Thorsten Sellin's evidence last year.

The WITNESS: I see. I have read it elsewhere I know. The justice was undoubtedly a highly qualified man in his own field but with respect to forecasting what would happen and the behaviour of people I would submit that he probably was not as capable of giving an opinion that was valid. Similarly here I think the same point of view might be expressed.

By Mr. Leduc:

Q. Notwithstanding his opinion, do you think that society would be sufficiently protected against those old offenders by the abolition of capital punishment?—A. I do not see that as the experience of jurisdictions in which capital punishment has been abolished, for example, where there has not been a sharp increase in homicides. Therefore, I do not find any reason to believe that that would be the case.

The PRESIDING CHAIRMAN: Mr. Blair?

By Mr. Blair:

Q. Mr. Chairman, I just have one or two questions to ask about an interesting experience of Mr. Fornataro's. I gather, Mr. Fornataro, that your government does not apply corporal punishment as a disciplinary measure in prison institutions?—A. That is correct. The rules and regulations of our gaols expressly forbid the inflicting of corporal punishment within the prisons except on the order of the court.

I might share a confidence with the members of this committee in this respect. During this past half year or so we, together with jurisdictions all over Canada, have experienced a considerable increase in our prison population, and an increase which carries with it a serious growth in problems, tensions, disciplinary control problems and so forth in institutions.

In our provincial gaol at Regina at one point we were overpopulated to the extent of about 70 or 80 per cent beyond our normal cell capacity which is a very serious condition at which to arrive. We had a disturbance. It could have been a riot had there not been very good presence of mind on the part of the staff and a very cool sense of control. Shortly thereafter I had some fairly serious discussion with the superintendent of the institution and his senior staff in which we talked very earnestly about the idea of requesting the minister to lift the regulation concerning the imposing of corporal punishment for breaches of discipline simply because of the problems we were up against, and the men who have the day-to-day job of running the jail decided that they should not even ask the question. Yet they were there facing the problem of attempting to deal with about as many people outside of cells as inside cells, with no possibility of segregation, having men awaiting trial as habitual criminals who felt they had nothing to lose, with the threat of running a tommygun in to effect an escape at one time, with the experience of picking up knives and other weapons. Yet in the face of this it was felt by those who had the day-to-day job of running the place that it was not necessary to ask for permission to inflict corporal punishment. To this day, throughout a very long continuation of very heavy population pressure and all the attendant problems of lack of segregation and so forth, we have no reason to believe that we should have had the power to inflict corporal punishment, and indeed we feel very thankful that it was not used, because we are quite sure that it would have provoked even more serious trouble.

The PRESIDING CHAIRMAN: If there are no further questions, I want to thank you, Mr. Fornataro, for coming down here from Saskatchewan to give assistance to this committee. We appreciate greatly your attendance here and the evidence you have given, which we know will be of value to us in our deliberations.

The next meeting will be on Tuesday at 11 o'clock.

